Supreme Court, U.S.
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No. 01-692

IN THE
Supreme Court of the United States

TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,

Petitioners,

v.

CYNTHIA TURNBULL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

PAUL F. PAUTLER, JR.
BLACKWELL SANDERS
PEPER MARTIN, LLP
Attorneys for Respondent
2300 Main Street
Suite 1000
Kansas City, Missouri 64108
(816) 983-8000

172517

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3 1 AP

QUESTIONS PRESENTED

1. Whether this Court should review the uniform rule in the federal courts that an employer may be liable under Title VII for failing to remedy a hostile sexual environment about which the employer had actual or constructive knowledge.

2. Whether, in the absence of a record from the Tenth Circuit in this case and/or any relevant conflict among the lower federal courts, this Court should review the State's heretofore unarticulated issue of whether a Title VII case based upon negligence impermissibly infringes upon a State's sovereign immunity.

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INTRODUCTION

This is a classic hostile environment sexual harassment case premised on an employer's misconduct for taking no action in the face of known sexual harassment and assault of its female employee by third parties. Cynthia Turnbull complained repeatedly to Petitioner Topeka State Hospital, a State-run entity ("TSH" or "the State"), that she was experiencing sexual harassment at work and suggested specific remedial measures, but TSH intentionally chose to do nothing. Thereafter, Turnbull suffered a vicious sexual assault and attempted rape by a third party under the control of the State under circumstances that would have been avoided had TSH acted upon Turnbull's complaints and implemented remedial measures.

The State of Kansas mischaracterizes this case as one involving a single incident of "bodily injury" and argues it should be immune from such claims. Of course, bodily injury, when in the form of a sexual assault and when, as here, preceded by numerous instances of unchecked sexual acting out, may form the basis of a claim for sexual harassment under Title VII. Although on appeal to the Tenth Circuit the State argued that a negligence standard should govern Turnbull's claim under Title VII, the State now claims for the first time that imposition of the negligence standard violates the State's sovereign immunity. Thus, the State encouraged Turnbull to invoke and the lower federal courts to decide this case under Title VII negligence principles, only to cry foul when the facts ultimately supported Turnbull. The State should be judicially estopped from pursuing such whipsaw tactics.

Moreover, with respect to the newly injected question of the State's Eleventh Amendment immunity, there is no record below — as the Tenth Circuit never considered the issue — and no conflict among the circuits. In short, this case is factually, legally, and procedurally inappropriate for Supreme Court review, and there is no reason for this Court to grant certiorari.

STATEMENT OF FACTS

TSH and the State of Kansas employed Turnbull as a psychologist from September 1993 until she was laid off in connection with TSH closure on March 21, 1997. After she was sexually assaulted and strangled by a male TSH patient on August 27, 1996, Turnbull took a medically-necessary leave of absence that continued until her formal termination.

A. Background

At all relevant times, TSH was a residential mental hospital operated under the direction of the Department of Social and Rehabilitation Services ("SRS"), an agency of the State of Kansas. During the time Turnbull was employed at TSH, the State operated four residential mental health facilities: TSH, Larned State Hospital ("LSH"), Ossawatomie State Hospital ("OSH"), and Rainbow Mental Health Facility.

Turnbull worked as a psychologist on the adolescent unit at TSH. Adolescent male patients at TSH could be as old as age 18 and were often physically mature. At trial, Turnbull obtained admissions from several of TSH's managers and executives that female employees were often sexually harassed by male patients but that the State considered the harassment "part of the job" and chose to do nothing about it.

B. Hostile Environment — What Turnbull and Others Endured

During almost her entire term of employment with TSH, Turnbull and other female employees were subjected to sexual acting out by male TSH patients. Adolescent males were among the most difficult to deal with because they tended to act out sexually toward other patients and staff. Turnbull's direct supervisor admitted sexual comments and sexual acting out by male patients toward staff were generally considered "part of the job" at TSH. Adolescent males tended to take a "macho stance" with female employees. Dr. Denman, another female psychologist, testified it was "fairly common" for some of the male patients to rub up against female staff or try to touch their breasts. She testified she was sexually harassed by psychiatric patients at TSH.

Another female employee testified male patients regularly made sexual comments toward female staff, unnecessarily touched or brushed up against staff members' bodies, and talked about having sexual intercourse with them. At least four (4) female employees at State psychiatric hospitals were brutally sexually assaulted (and one was killed) between 1992 and August 1996.[1] The State failed to present any evidence male employees were ever sexually assaulted at TSH. In fact, the State's Chief of Security at TSH admitted that in his 21 years at TSH, he was unaware of any male employees ever being sexually assaulted at State hospitals.

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1. The four females were Stephanie Uhlrig, who was sexually assaulted and murdered, Turnbull, and two female employees who were sexually assaulted by the same patient who attacked Turnbull.

Turnbull testified the adolescent males on the unit had "raging hormones" and "a lot of sexual urges," combined with a very immature, primitive impulse control. That combination resulted in frequent sexual acting out on the adolescent unit. While attempting to treat the adolescent males, Turnbull experienced lewd sexual remarks, groping and grabbing, and vulgar sexual gestures. Turnbull recalled the adolescent male patients would brush or rub their "private parts" up against her and/or attempt to touch her private parts.

Turnbull testified about a time when a male patient reached up under her dress and grabbed her thigh. She related an instance when a male patient grabbed her breast and attempted to grab other parts of her. She testified about occasions when male patients grabbed her hair, her arm, and/or her body and pushed her in ways that were controlling and sexually motivated. Turnbull testified that, during group sessions she conducted with male patients, she regularly became frightened and uncomfortable because the male patients were sexually acting out toward her. Turnbull testified she endured these sexually harassive acts — including comments, propositions, sexual name calling, and groping or rubbing of private parts — on a weekly, if not daily basis. Additionally, Turnbull related she was frightened because she knew that another female employee, Stephanie Uhlrig, had previously been sexually assaulted and murdered by a male TSH patient. Turnbull was so frightened, in fact, that she would get up from a group session and the back of her shirt would be wet with sweat.

In spite of the clear risk of sexual harassment and assault, TSH provided inadequate sexual harassment and self-defense training. TSH trained Turnbull that sexual harassment occurred between co-workers or between a co-worker and a

supervisor. TSH never acknowledged to Turnbull that patients could sexually harass staff or that she had the right to complain about sexual harassment by patients. TSH provided no training to help Turnbull and other female staff cope with and defend themselves against such sexual harassment. Indeed, Dee Lowe, TSH Personnel Director, believed the TSH sexual harassment policy did not even apply to sexual harassment by patients. Instead, she considered such acts a "clinical issue." In fact, during one sexual harassment training session, a staff member asked Ms. Lowe a question about sexual harassment by patients. Ms. Lowe specifically responded that was a clinical issue with which the TSH Personnel Department would not deal.

Additionally, witnesses consistently agreed TSH was chronically understaffed to provide a secure environment for female employees. Females wanted more staff, including more male staff, to help control the male patients. There were no treatment rooms on the adolescent unit, which necessitated that staff members take male patients off the units — to either secluded treatments room elsewhere on campus or for walks on the campus grounds — for private therapy. TSH failed or refused to put alarms in the psychologists' offices and/or provide them with personal alarms ("screechers"), which could have been purchased for $5.99 a piece, or any other means of protection.

C. The State's Knowledge of the Hostile Environment and Risk of Sexual Assault

Prior to the sexual assault of Turnbull on August 27, 1996, TSH's executive and management employees were well aware of the male patients' propensities to act out sexually toward females at TSH, but took no effective preventative

or remedial action to ensure that Turnbull and/or other female employees would be safe from harassment. Among other things, the 1992 sexual assault and murder of Stephanie Uhlrig on the TSH campus by a male TSH patient was a well-publicized event that caused the female staff great concern.

In May 1996, the TSH Executive Committee recognized that staff members exhibited "a reality based fear" about safety on the units. In fact, in July 1996, only one month before Turnbull was sexually assaulted, the staff's safety concerns were so pronounced and well known that the Executive Committee discussed transferring patients to other State hospitals. These transfers never occurred. Indeed, even in October 1996 — six weeks after Turnbull was sexually assaulted — the TSH Risk Management Committee recognized that TSH's inability to transfer patients, combined with continuous admissions, still caused female staff grave concern about their safety.

The TSH Director of Psychology, Magdalene Kovach, reluctantly testified male patients made frequent comments of a sexual nature toward her. She knew patients unnecessarily brushed or rubbed up against staff members' bodies. Dr. Kovach admitted she had been accosted in a sexual way that did not progress to rape. Indeed, she considered it a well-known risk that patients at TSH could act out sexually. She also agreed that the risk of being touched sexually by patients was greater for female staff than for male staff. In fact, she considered the greater risk to female staff as just "in the nature of being female." She considered the instances of sexual assault as one of the job hazards at TSH — simply part of the job description.

Turnbull's direct supervisor, Dr. Lou Hoover, was also well aware of the sexual environment at TSH. Dr. Hoover, a female, admitted sexual comments and sexual acting out by male patients toward staff were just generally considered part of the job at TSH. She admitted the risk of sexual assault was greater for female staff than for male staff. Her observation was that adolescent male patients tended to take a macho stance with female staff, did not like to be told what to do by female staff, and that male staff tended to have more control over the male patients.

Janet Metz, TSH Nursing Supervisor, likewise admitted she knew male adolescent patients made sexual comments and threats to staff members on a daily basis. She understood female staff at TSH faced a greater risk of sexual assault than male staff. Ms. Metz's nursing staff asked her for more male staffing to help control the situation, but TSH took no such action.

D. Turnbull's Complaints and Requests for Remedial Measures and the State's Refusal to Remedy the Known Sexually Hostile Environment

In addition to the knowledge TSH already had about the sexually hostile environment based on its supervisors' and employees' experiences, Turnbull specifically complained about the sexual comments and acts she experienced and the danger to female staff members. On the occasion when the male patient reached under Turnbull's skirt and grabbed her upper thigh, Turnbull complained about the incident to Dr. Kovach and discussed whether she should file an Incident Report. Dr. Kovach discouraged Turnbull from reporting the incident, and told her she would be viewed as a troublemaker if she did.

Turnbull also kept Dr. Hoover, her supervisor, aware of the harassment she endured from male patients. Turnbull reported to Dr. Hoover that male patients were making inappropriate sexual comments to her and she felt harassed. She told Dr. Hoover that the harassment made her "very uncomfortable" and that she was unable to redirect the male patients herself. Dr. Hoover and Turnbull discussed the fact that a male staff member was supposed to help Turnbull with the male patients, but he did not show up for the sessions. Dr. Hoover admitted both she and Turnbull had agreed that Turnbull would benefit from having a male staff member help control the male patients. In addition to the fact that a male staff member was rarely, if ever, present, Turnbull complained to Dr. Hoover about the chronic understaffing on the adolescent unit. Dr. Hoover told Turnbull understaffing was a controversial topic TSH administration did not want to hear about. In these conversations with Dr. Hoover, Turnbull specifically raised the need for additional male staffing on the adolescent unit.

On April 5, 1995, Turnbull took her concerns about the sexually hostile environment to a meeting of TSH administrative department heads, including, among others, Randy Proctor, TSH Superintendent; Dr. Kovach, TSH Director of Psychology; and Ms. Metz. At the meeting, Turnbull reported the female staff members were frightened and needed additional male staff on the unit, because male staff tended to have a pacifying effect on the patients

Following the administrative meeting, TSH published a set of minutes that accurately reflected Turnbull's concerns about the dangerous environment for women and her suggestions for improvements. A day later, TSH recalled the original minutes and distributed a new version that sanitized

Turnbull's statements and did not reflect her concerns about the hostile sexual environment.

Because the State failed to take any remedial action after the April 5, 1995 meeting — and because the meeting minutes had been sanitized — Turnbull prepared to write a memorandum to TSH administration outlining her complaints and suggestions. In May 1995, Turnbull discussed her plan with Dr. Kovach, TSH Director of Psychology. Dr. Kovach told Turnbull to "relax about safety issues on the adolescent unit." She directed Turnbull not to write the proposed memorandum. Dr. Kovach also warned Turnbull that Mr. Proctor (TSH Superintendent) believed the psychologists were "stirring up trouble." She further warned Turnbull that Mr. Proctor would "come down on troublemakers like a ton of bricks." Because she wanted to keep her job, Turnbull did not write the proposed memorandum.

Moreover, the TSH administration specifically warned Turnbull and others not to raise the issue of understaffing with Joint Commission for Accreditation of Healthcare Organizations ("JCAHO") auditors, independent investigators who periodically review healthcare organizations. TSH warned employees that such complaints could "backfire" and the hospital could lose its accreditation. Dr. Hoover admitted at trial that it was "fairly routine" to remind employees not to draw attention to problems.

As described above, Turnbull and other women continually complained about the need for greater security and protection of female staff and the critical understaffing at TSH — specifically the absence of male staff. In light of concerns for their safety, Turnbull and Laura Talley asked for an additional staff member to accompany them to a series

of group therapy sessions they conducted in another building on campus. Out of the approximately 50-80 times they requested additional staff, they received such assistance only approximately 5 or 6 times, at most. TSH managers told Turnbull and Dr. Talley there were not enough staff to send one with them.

Turnbull requested that TSH construct a treatment room with a plexiglass viewing window on the adolescent unit so private therapy sessions could be conducted by female psychologists, but observed by others to prevent dangerous attacks. Under the then-existing system, to conduct private therapy, psychologists such as Turnbull had to take patients, alone, either to their private offices, on walks around the campus, or to other buildings on campus where treatment rooms existed. None of these was a safe option for female staff. TSH failed to construct such a treatment room, in spite of the fact TSH had remodeled the adolescent unit during Turnbull's employment.

Prior to Turnbull's sexual assault on August 27, 1996, the State had not implemented any of her suggestions or taken any other steps to remedy the sexually hostile environment at TSH. To the contrary, the State had not even taken the additional safety precautions it had represented to the Legislative Post Audit Committee it would take following the sexual assault and murder of Stephanie Uhlrig in 1992.[2]

During the 1992 legislative post audit investigation, TSH represented it would undertake additional training on youth

2. Following the brutal sexual assault and murder of Ms. Uhlrig in 1992, TSH was investigated by a State committee, the Legislative Post Audit Committee, to review conditions at the hospital and make recommendations for change.

gangs and working with dangerous people. TSH never did. In fact, the State expressly refused to provide TSH staff with self-defense training to fend off a sexual attack. In light of the staff uprising after the Stephanie Uhlrig attack, TSH requested that David Mandt & Associates, an independent security consultant, develop a self-defense program to teach staff members how to fend off an aggressive attacker and specifically how to extricate from a patient's choke hold. Mandt & Associates developed such a program and previewed it to the State, but the program was not presented to TSH employees while Turnbull was employed.

Finally, in June 1996, when Turnbull's attacker, James Stout, transferred from the State's facility at Larned State Hospital (LSH), the State's LSH employees failed to note in the transfer papers that Stout had sexually assaulted two female employees at LSH. Prior to the time she was sexually assaulted and strangled on August 27, 1996, Turnbull did not know Stout had previously sexually assaulted at least two other female employees at LSH.

E. Sexual Assault of Turnbull

On August 27, 1996, James Stout, a TSH patient, viciously sexually assaulted Turnbull while she attempted to conduct a therapy session with him. Stout ripped Turnbull's clothes off in a public area, choked and bit her, groped her private body parts, inserted his fingers inside her, and told her to "give me some pussy" or he would kill her. He left Turnbull crawling naked on the TSH campus, trying to pull her undergarments up around herself. An ambulance transported Turnbull to an emergency room where she received treatment for the physical injuries she sustained. Following the attack, Turnbull was unable to work at TSH because she was too emotionally traumatized to return to the TSH campus.

At the time she was sexually assaulted, Turnbull was acting in conformance with all applicable TSH policies and procedures. Psychologists at TSH typically took patients for walks on the hospital grounds to conduct therapy sessions, and Stout was not, at that time, under any assault precautions or any other limited status that would have prohibited Turnbull from conducting the therapy session while walking on hospital grounds. Indeed, in the week before Stout attacked Turnbull, other TSH caregivers took him off campus to the zoo, a fishing trip, shopping, to the museum, and for a train ride. Following the sexual assault and subsequent investigation, the TSH Risk Management Committee concluded that, among other things, Turnbull was not at fault for the attack as she had met the appropriate standard of care.

Had TSH told Turnbull that Stout had previously sexually assaulted two other female care-givers at LSH, she would never have conducted therapy with him and, in fact, she would have sought his transfer to a more secure treatment facility. Had TSH provided private treatment rooms on the adolescent unit where Turnbull and other psychologists could conduct therapy while being observed for safety, she would have used them. Had TSH provided screechers, Turnbull would have been able to summon assistance, or frighten Stout, when he attacked her. Had TSH provided additional self defense training to TSH staff, particularly training on how to extricate from a choke hold, Turnbull would have been in a better position to defend herself from the sexual attack. Had TSH maintained the additional staffing necessary so Turnbull could have been accompanied by another staff member, the attack could have been avoided or greatly minimized.

F. The State's Actions After the Sexual Assault

Within weeks after the sexual assault, Dr. Kovach, TSH Director of Psychology, initiated conversations with Turnbull in which Dr. Kovach demeaned Turnbull, minimized the seriousness of the situation, and insinuated Turnbull's attractiveness was to blame for the sexual assault. Among other things, Dr. Kovach pressured and harassed Turnbull to return to work at TSH as soon as possible because "women in Bosnia were raped all the time and they got right on with business." Additionally, Dr. Kovach asked Turnbull what she expected and insinuated the sexual assault was caused by Turnbull's long hair, trim figure, and nice wardrobe.

Dr. Kovach's minimization of the life-threatening sexual assault caused Turnbull great additional emotional distress. Because of the sexual assault and Dr. Kovach's subsequent harassment, Turnbull's physician determined she was unable to return to work at TSH.

G. Proceedings at Trial

After proceeding through the EEOC administrative process, Turnbull filed a Complaint against TSH and the State of Kansas in the United States District Court for the District of Kansas, alleging Title VII hostile environment sexual harassment. The parties tried this case to a jury beginning February 1, 2000. The State did not object to the Court's ultimate verdict director.[3]

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3. The district court instructed the jury that in order to prevail on her hostile environment claim, Turnbull had to prove the following: (1) plaintiff was subjected to sexual comments, propositions, touchings, assault, or a risk of sexual assault while employed at

(Cont'd)

At the close of Turnbull's evidence, the State presented an oral motion for judgment as a matter of law. The district court did not invite argument from Turnbull, but instead immediately took the State's motion under advisement. At the close of all the evidence, the State renewed its oral motion for judgment as a matter of law, which the district court again took under advisement without inviting argument from Turnbull.

After seven days of evidence, the district court submitted the case to the jury for deliberation at approximately 11:30 a.m., on February 10, 2000. The jury deliberated until approximately 4:30 p.m., at which time they broke for the evening. The next morning, the jury deliberated for another two hours and then reported they were deadlocked. The jury found for Turnbull on the Verdict Form's first question,[4] but

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(Cont'd)

Topeka State Hospital; (2) such conduct was unwelcome; (3) such conduct was based on plaintiff's gender; (4) such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or offensive; (5) at the time such conduct occurred and as a result of such conduct, plaintiff believed her work environment to be hostile; (6) defendants knew or should have known of the sexual comments, propositions, touchings, assaults, or risk of sexual assault; and (7) defendants failed to take prompt and appropriate corrective action to prevent or remedy the unwelcome conduct or risk of unwelcome conduct.

4. Question #1 on the Verdict Form asked: "Do you find that Cynthia Turnbull was subjected to hostile work environment sexual harassment while employed by Topeka State Hospital and the State of Kansas?" The jury must have unanimously answered the first question "yes," because such a response was necessary for the jury to move to question #2, on which the jury was unable to reach consensus.

deadlocked 7-1 in favor of Turnbull on the second question.[5] At that point, without instructing the jury to continue deliberations and, again without hearing argument from Turnbull, the district court granted the State's oral motion for judgment as a matter of law that the district court had previously taken under advisement. (Pet. App., 13a)

H. The State Argued for a Negligence Standard on Appeal

Turnbull appealed to the Tenth Circuit and argued that the evidence presented at trial created a factual issue for the jury and precluded judgment as a matter of law. ***The State*** in turn argued for a ***negligence*** standard and asserted simply that Turnbull failed to present evidence to support her case. Indeed, the State specifically argued in its brief that a negligence standard must be applied:

> **IV.** ***A Negligence Theory must be Applied to Determine Whether Defendants may be Liable for Conduct of Non-Employees; here Adolescent Psychiatric Patients***
>
> In a case such as this one that presents a claim under Title VII for sexual harassment perpetrated by non-employees, the only basis for employer liability is a negligence theory. [citations omitted]. Thus, employers may be held liable in these

5. The Verdict Form's second question, on which the jury deadlocked 7-1 in favor of Turnbull, asked: "If you answered 'Yes' to question 1, do you find that Topeka State Hospital and/or the State of Kansas are liable for the hostile work environment sexual harassment Turnbull was subjected to under the standards set forth in the court's instructions?"

> circumstances if they fail to remedy or prevent a hostile or offensive work environment of which management level employees knew, or in the exercise of reasonable care, should have known. [ ]

V. *Plaintiff Failed to Present Evidence to Sustain her Burden of Proof for her Hostile Environment Claim*

A. Plaintiff's burden of proof

> To prevail on her sexual harassment theory, plaintiff must prove that: (1) she is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on her sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take appropriate remedial action. [citations omitted]

See State's Response to Opening Brief of Plaintiff/Appellant Turnbull, at 37-38. Thus, the State's proposed standard on appeal specifically ratified the district court's verdict director to which the State had not previously objected.

The Tenth Circuit held that Turnbull presented sufficient evidence she was subjected to a sexually hostile work environment and also that the State failed to take reasonable measures after having actual or constructive knowledge of the hostile sexual environment. (Pet. App., 6a-10a). The Court of Appeals reversed and remanded the case for a new trial. (Pet. App., 10a).

REASONS FOR DENYING THE WRIT

This Court should deny review. First, with regard to the proper Title VII liability standard, the State should be estopped from contesting a principle it specifically ratified and argued for on appeal. Moreover, the federal circuits universally approve a Title VII hostile environment standard in accord with the district court's verdict director at trial and, thus, there is no split of authority on the issue.

Second, with regard to the State's newly articulated Eleventh Amendment immunity attack, neither the lower courts in this case nor any other federal circuits have ever considered whether a Title VII hostile environment negligence standard infringes upon a State's sovereign immunity. Obviously then, the issue has not been explored by the lower courts, and this Court's review would be premature where no circuit split has yet emerged. Additionally, this case would be a poor vehicle for Supreme Court review of the issue, because any action by the Court would result in remand for a new trial and, in light of the evidence at trial, Turnbull would prevail even under the heightened deliberate indifference standard now touted by the State.

I. The Title VII Hostile Environment Sexual Harassment Liability Standard Is Not Appropriate for This Court's Review.

This Court should decline to review the Title VII hostile environment standard for at least two reasons. First, the State should be judicially estopped from attacking the very standard it argued for at the Tenth Circuit. Second, in the absence of any circuit split on the issue, the well-established Title VII negligence standard does not merit this Court's time and attention.

A. The State should be estopped because it argued for a negligence standard before the Tenth Circuit.

In response to Turnbull's Tenth Circuit appeal, the State specifically argued for and obtained a negligence standard in this hostile environment sexual harassment case. Pursuant to the doctrine of judicial estoppel, the State may not now be heard to complain because it lost under the very standard it advanced.

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808, 1814 (2001); *Pegram v. Herdrich*, 530 U.S. 211, 228, 120 S. Ct. 2143, 2154 (2000).

Not only did the State fail to object to the standard used by the district court in this case, it explicitly fought for that exact standard before the Tenth Circuit. The State wanted this case decided under Title VII negligence principles. The Tenth Circuit applied such a standard, and Turnbull prevailed because she submitted sufficient evidence at trial to support a claim of sexually hostile work environment. (Pet. App., 10a). The State lost under the principles it trumpeted, so now it wants to change the rules. It would be patently unfair — and fly in the face of the doctrine of judicial estoppel — to allow the State to sandbag Turnbull in this manner.

B. There is no circuit split and the lower courts universally articulate a negligence standard for Title VII hostile environment sexual harassment.

Even if the State is not judicially estopped, this Court should not review the Title VII hostile environment standard, because the federal circuits are in accord with the principles adopted by the Tenth Circuit. Where the acts of harassment stem from co-workers or third parties, the lower courts are in agreement that a Title VII negligence standard[6] applies in determining employer liability.[7]

The State did not cite, and Turnbull has not found, any reported lower court cases requiring deliberate indifference in a Title VII hostile environment sexual harassment case.

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6. The central elements of the Title VII hostile environment standard adopted by the federal circuits cited include: (1) that plaintiff was subjected to a sexually hostile environment; (2) that defendant knew or should have known of the harassment; and (3) that despite actual or constructive knowledge, the defendant failed to take adequate remedial action to end the harassment.

7. *See O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001); *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001); *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 298 (5th Cir. 2001); *Smith v. First Union Nat. Bank*, 202 F.3d 234, 241 (4th Cir. 2000); *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1078-79 (6th Cir. 1999); *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997); *Bonenberger v. Plymouth Township*, 132 F.3d 20, 25 (3d Cir. 1997); *Ridley v. District of Columbia*, 945 F. Supp. 333, 336 (D. D.C. 1996); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1042 (2d Cir. 1993); *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989).

In the absence of any circuit split on the issue, this Court should decline review of the clearly established Title VII hostile environment standard.

II. There is No Circuit Split Regarding Title VII's Abrogation of a State's Sovereign Immunity; the Issue is Undeveloped and Not Ripe for Review.

It is similarly well settled that in enacting Title VII, as well as its 1991 amendments, Congress abrogated the Eleventh Amendment immunity of the states.[8] Thus, no circuit split exists in that regard.

The State did not advance its novel argument — that a Title VII hostile environment case premised on anything other than a deliberate indifference standard infringes upon sovereign immunity — before the Tenth Circuit and, in fact, it has apparently never been specifically addressed by any lower court. At least implicitly, however, numerous courts have allowed Title VII hostile environment claims against a

8. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Laro v. New Hampshire*, 259 F.3d 1, 6 (1st Cir. 2001); *Holman v. State of Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 2000); *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000); *In re Employment Discrimination Litig. Against the State of Alabama*, 198 F.3d 1305, 1316-17 (11th Cir. 1999); *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 448 (2d Cir. 1999); *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593, 594 (7th Cir. 1999); *Ussery v. Louisiana*, 150 F.3d 431, 434-35 (5th Cir. 1998); *Winbush v. Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995); *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554, 1561 (10th Cir. 1994); *Cerrato v. San Franciso Cmty. College Dist.*, 26 F.3d 968, 975-76 (9th Cir. 1994); *Greenwood v. Ross*, 778 F.2d 448, 452-53 (8th Cir. 1985); *Shawer v. Indiana Univ. of Penn.*, 602 F.2d 1161, 1163 (3d Cir. 1979).

state, federal, or municipal entity without requiring deliberate indifference.[9]

The State relies heavily on cases espousing a "deliberate indifference" standard in relation to wholly separate statutory schemes. For instance, the State cites *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999), a Title IX case allowing a hostile environment cause of action against a school board where the board took inadequate action to end student-on-student sexual harassment. The State focuses on *Davis* because the Court enunciated a standard whereby

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9. *See Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990) (employer negligence or recklessness in failing to respond to hostile work environment sexual harassment claims by employees may result in liability); *see also Longstreet v. Illinois Dep't of Corrections*, 276 F.3d 379, 381 (7th Cir. 2002) (holding that in cases involving sexual harassment by a coworker, an employer is liable for employment discrimination under Title VII only if it negligently failed to take steps to remedy the illegal harassment) (*citing Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999)); *Mikels v. City of Durham*, 183 F.3d 323, 329 (4th Cir. 1999) (Title VII liability will be imposed on employers if they are directly negligent in failing to act after receiving notice of alleged sexual harassment); *Davis v. United States Postal Service*, 142 F.3d 1334, 1342 (10th Cir. 1998) (employer can be held liable under Title VII if the employer was negligent or reckless in failing to respond to hostile work environment sexual harassment by employees); *Jeffries v. State of Kansas*, 147 F.3d 1220, 1229 (10th Cir. 1998) (under Title VII, an employer is negligent if it fails to remedy or prevent a sexually hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known); *Freeman v. Kansas*, 128 F. Supp. 2d 1311, 1322 (D. Kan. 2001) (an employer is not liable for racial harassment by a coworker under Title VII unless the employer was negligent) (*citing Hirschfeld*, 916 F.2d at 577).

liability attaches only when a school board shows "deliberate indifference" to ongoing harassment.

However, this Court's Title IX predecessor to *Davis* — and the case that established the deliberate indifference standard for Title IX harassment disputes — was *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998). In determining that the heightened standard should apply to Title IX, *Gebser* expressly contemplated the differing purposes and characteristics of Title IX and Title VII. *Gebser*, 118 S. Ct. at 1997-2000. Because *Gebser* specifically distinguished Title IX from Title VII in formulating the deliberate indifference standard for Title IX harassment, the State's attempted reliance on *Davis* is misplaced. Indeed, the State seeks to turn *Gebser* and *Davis* on their ears and surmise that this Court should now adopt the Title IX standard for Title VII sexual harassment cases.

Turnbull respectfully suggests that, given the complexity of the Title VII sovereign immunity issue, the intricate factual scenario presented in this case, [10] and the fact that no lower court has ever expressly addressed the question, this Court should permit the matter to be debated by the lower courts and intervene only if and when a circuit split emerges.

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10. Practically, the negligence/deliberate indifference debate is a moot point. At trial, Turnbull presented voluminous evidence of the State's ***actual*** knowledge of a hostile sexual environment and that the State intentionally chose to do nothing despite Turnbull's and others' numerous complaints and suggestions for remedial measures.

CONCLUSION

The State seeks to avoid liability for its misconduct in taking no action despite known sexual harassment and sexual assault of its female employees. During trial and on appeal, the State invited and welcomed a negligence standard in this Title VII hostile environment sexual harassment case. The State previously argued Turnbull simply could not present sufficient evidence to support her case. The Tenth Circuit — after fully considering relevant Title VII precedent, the parties' briefs, and the evidence adduced at trial — adopted the State's negligence standard, found for Turnbull, and remanded the case for a new trial. Thereafter, the State reversed its position and now contends for the first time that a Title VII negligence standard violates its Eleventh Amendment sovereign immunity.

In the absence of any split among the federal circuits and because of the State's failure to raise the "negligence standard" and "sovereign immunity" issues in any manner below, this case is inappropriate for Supreme Court review. For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

PAUL F. PAUTLER, JR.
BLACKWELL SANDERS
PEPER MARTIN, LLP
Attorneys for Respondent
2300 Main Street
Suite 1000
Kansas City, Missouri 64108
(816) 983-8000